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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-1706

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON, *Petitioner*,

v.

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, *et al.*, *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITIONER'S REPLY BRIEF

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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STATE PRINTING PLANT ◆ OLYMPIA, WASHINGTON

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INTRODUCTION

In their brief, the respondent Stevedores really advance only three major arguments in support of the decision below: (1) the language of the Import-Export Clause[1] constitutes a flat prohibition against state excise taxes on imports or exports (Resp. Br. 9-18); (2) Washington's business and occupation (B&O) tax on stevedoring activity amounts to a toll or transit fee on goods moving through Wash-

[1] U.S. Const., Art. I, §10, cl. 2.

ington ports, thus creating an evil which the Import-Export Clause was designed to prevent (Resp. Br. 19-23); and (3) even fairly apportioned, non-discriminatory state excise taxes on interstate carriers should be struck down on Commerce Clause[2] grounds because such taxes are capable of being used to exact tolls from commerce moving through a state (Resp. Br. 23-33).

The short answer to the Stevedores' first argument is that neither the plain language nor the purposes of the Import-Export Clause require a *per se* ban on all types of state "excise" taxes imposed on carriers or handlers of goods moving in the import-export process. By its express terms, the Import-Export Clause prohibits only "Imposts and Duties", *i.e.* taxes directed at imports or exports as such. An excise tax such as Washington's fairly apportioned, non-discriminatory state B&O tax on stevedoring activity is not directed at imports or exports as such and is therefore not an "impost" or "duty" within the meaning of those terms as used in the Import-Export Clause.

It is apparent that the second and third arguments are one and the same: if a state tax creates a "trade barrier" impeding the free flow of goods in interstate or foreign commerce, such a tax contravenes the purposes of *both* the Commerce and Import-Export Clauses. The short answer to this argument is that a fairly apportioned non-discriminatory tax

[2] U.S. Const., Art. I, §8, cl. 3.

on handlers or carriers of goods moving in interstate or foreign commerce cannot create the "trade barrier" effect forbidden by the Constitution. Rather, such a tax constitutes a permissible demand on interstate or foreign commerce in return for the governmental services rendered to such commerce by the taxing state. To accept the Stevedore's argument would be to return to the discarded notion that the Commerce and Import-Export Clauses create a "free trade" zone of immunity and would require the states to subsidize the conduct of interstate and foreign commerce within their borders.

ARGUMENT

I. The Language of the Import-Export Clause Does Not Require a Per Se Ban On All Types of State Excise Taxes Imposed On Carriers or Handlers of Goods Moving in the Import-Export Process.

The Stevedores argue that the language of the Import-Export Clause constitutes a flat prohibition against all types of state "excise" taxes on imports or exports, citing *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946). Resp. Br. 9-18. However, neither the plain language of the Import-Export Clause nor *Richfield Oil* supports the Stevedores' expansive view of the protection afforded imports and exports by the Constitution.

First, the plain language of the Import-Export Clause contains a flat prohibition *only* against "Imposts and Duties" levied by a state. The term "excise"

does not appear anywhere in the Clause. To demonstrate that there is a difference between "Imposts and Duties" and "excises", well understood by the Framers of the Constitution, one need only cite U. S. Const., Art. I, §8, cl. 1, which provides:

> "The Congress shall have Power to lay and collect Taxes, Duties, Imposts *and Excises*, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts *and Excises* shall be uniform throughout the United States; * * *" (Emphasis supplied)

Thus, even the Framers recognized a distinction between "Imposts and Duties" and "Excises". That distinction was explained in a 1911 case in which the Court held that a corporate net income tax levied by the United States was an "excise":

> "Duties and imposts are terms commonly applied to levies made by governments on the importation or exportation of commodities. Excises are 'taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.' Cooley, Const. Lim. 7th Ed. 680." *Flint v. Stone Tracy Co.*, 220 U.S. 107, 151 (1911).

Washington's B&O tax on the Stevedores is undeniably an "excise tax". But that characterization alone does not bring the tax within the term "Imposts and Duties" as used in the Import-Export Clause. In order to be regarded as an impost or

duty, a tax, by whatever name it may be called, must be directed at imports or exports as such or must create an evil the Import-Export Clause was specifically designed to prevent. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 293-294 (1976).[3]

Second, to the extent that *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946), can be said to stand for the proposition that the Import-Export Clause prohibits *any tax*, whether or not discriminatory, on imports or exports, it has been impliedly limited by this Court's decision in *Michelin*, *supra*. In *Richfield Oil*, the Court held that California's sales tax, as applied to the sale of oil to the government of New Zealand consummated by delivery on board a New Zealand Navy tanker berthed in Los Angeles violated the Import-Export Clause because at the time the tax attached the oil had the status of an "export", i.e., it was in the export process. Thus, the *Richfield Oil* decision is merely one of a long line of cases representing an earlier approach taken by this Court in attempting to identify the time at which an absolute immunity from all forms of state taxation attached to goods because of the *status* of such goods as imports or exports. See, e.g., *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534 (1959), and other cases

[3] Of course, the above discussion is not to suggest that an "excise" tax can never be considered an "impost or duty" within the plain meaning of the Import-Export Clause. Rather, it underscores the point made in *Michelin*, *supra*, and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), that the proper inquiry is into the practical operation and effect of the tax rather than a mere formalistic search for the correct "label"—an approach with which the Stevedores understandably have little sympathy.

cited and discussed in Petitioner's Opening Brief at pp. 35-36.

To be sure, during the course of the *Richfield Oil* opinion, Justice Douglas, speaking for the majority, declined to read into the Import-Export Clause an implied qualification limiting the scope of the Clause's prohibition solely to discriminatory state taxes. *Richfield Oil, supra*, 329 U.S. at 75-78, quoted in Resp. Br. at 11-12. But that view surely has been modified by this Court's decision in *Michelin, supra*, upholding a general, non-discriminatory ad valorem property tax on imported tires without regard to whether the goods had lost their status as imports. As one commentator has explained:

> "In *Michelin*, the Court disentangled itself from the thorny problem of locating imported goods in time and space in the context of their intended use to determine whether they had retained their distinctive character as imports. Instead, the Court's opinion makes it clear that the central question in such cases is whether the exaction at issue discriminates against imported goods on the basis of their foreign origin."

W. Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?* 75 MICH. L. REV. 1426, 1447 (1977).

In sum, neither the plain language of the Import-Export Clause nor the Court's decisions construed in *Richfield Oil* provides any basis for the rigid per se ban on all types of state excise taxes imposed

on carriers or handlers of goods moving in the import-export process urged upon this Court by the Stevedores. The remaining and crucial inquiry is whether the tax in question—whatever its "label"—discriminates against imports and exports or otherwise causes evils which the Import-Export Clause was designed to prevent, and it is to this subject (and its companion, discrimination under the Commerce Clause) we now turn.

II. The Challenged Tax on Stevedoring Activity Does Not Discriminate Against Interstate or Foreign Commerce, and Does Not Produce Effects Forbidden by the Commerce or Import-Export Clause.

The Stevedores argue that Washington's B&O tax on stevedoring activity amounts to a toll or "transit fee" on goods moving in interstate or foreign commerce, and is therefore invalid under both the Commerce and Import-Export Clauses. Resp. Br. 19-33. Beginning with the premise that the B&O tax on stevedoring activity "* * * has the economic affect [sic] of 'singling out' water-carried imports and exports * * *" (Resp. Br. 21), the Stevedores argue that even a fairly apportioned, nondiscriminatory excise tax levied on handlers of goods moving in interstate or foreign commerce should be struck down because such taxes cast burdens on noncitizens of the taxing state and create the risk of what the Stevedores term a "tollgate syndrome", thus causing the "trade barrier" effect which the

Commerce and Import-Export Clauses were designed to prevent.

This argument is without merit. Washington's B&O tax does not "single out" Stevedoring activities; the tax does not cast impermissible burdens on non-citizens of the state, or put otherwise, the tax does not amount to a toll or "transit fee" on goods moving through Washington ports.

A. *Washington's B&O Tax Does Not "Single Out" Stevedoring Activity.*

Washington's B&O tax is a broad-based gross receipts tax reaching virtually every business and occupation carried on in the state. See, RCW 82.04-.220 (Pet. Br. App. A). Washington has no net income tax, and therefore must depend upon the B&O tax as a major source of revenue for the support of state government.[4]

Although, as pointed out by the Stevedores, there are differing tax rates applicable to different types of business activity (Resp. Br. 3-4),[5] the tax rate which would be applied to the Stevedores (1.06 percent) is the same as that applied generally to all

[4] In the 1977-79 biennium, the B&O tax is estimated to be the source of 10.9 percent of the state's general fund revenue. The retail sales and use tax (RCW chapters 82.08 and 82.12, respectively) is the only larger single source of tax revenue for the state. See 1977-79 Budget Message of Governor Dixy Lee Ray, p. 3 (App. A, hereto).

[5] Presumably, a major reason for these differing tax rates is the legislature's judgment about the relative profitability of different classes of business. Given that B&O tax liability is determined without regard to whether a particular taxpayer has turned a profit, structuring tax rates according to relative profitability more closely approaches taxation on an "ability to pay" basis while at the same time providing a firm foundation for tax revenues in periods of statewide economic downturns.

businesses of a service nature, e.g., barbers, accountants, doctors, freight consolidators, etc.

In passing, the Stevedores' apparent argument that the multiplicity of B&O tax rates makes it susceptible to discriminatory use against stevedoring activity (Resp. Br. 31-33) can have no relevance to the present case. First, as this Court observed in *Complete Auto Transit*, *supra*, the mere risk of such discrimination is not sufficient to require a per se rule of unconstitutionality; 430 U.S. 274 at 288-289, fn. 15. Second, this argument really goes only to the *measure* of the tax, and not to its *subject*, yet this present case concerns the Stevedores' claim that it is the character of the subject of the tax (that is, stevedoring activity) which somehow renders it unconstitutional.

Given the broad-based application of the B&O tax and its non-discriminatory imposition on the Stevedores, it is sheer nonsense to argue that the tax "singles out" water-carried imports and exports. The Stevedores are not being asked to bear a special tax burden not borne by other businesses similarly situated, nor are they being asked to pay a tax on business activity conducted in other states. Thus, even if it could be said that a tax on the carrier is equivalent to a tax on the goods (Resp. Br. 22), there is nothing in the application of Washington's B&O tax to stevedoring activity which "singles out" imports and exports for special tax treatment. All that Washington has done is to require the Stevedores to

bear their fair share of the cost of governmental services rendered to them by the State. See, *Michelin*, *supra*, 423 U.S. 276 at 287; *Complete Auto Transit*, *supra*, 430 U.S. 274 at 288.

B. *Washington's B&O Tax on Stevedoring Activities Does Not Cast Impermissible Tax Burdens on Non-Citizens of the State.*

In the course of their arguments regarding both the Commerce and Import-Export Clauses, the Stevedores make much of what they perceive to be a distinction in this Court's decisions involving "movement" and "non-movement" cases. Resp. Br. 18, 23-28. According to the Stevedores, this Court's decisions in *Interstate Oil Pipeline Co. v. Stone*, 337 U.S. 662 (1949), *Canton Railroad Co. v. Rogan*, 340 U.S. 511 (1951), and *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), can be distinguished from the present case because, say the Stevedores, they all involved an excise tax on intrastate carriers who linked up with interstate carriers. Because, in the Stevedores' view, local consumers and producers bear the tax burden in such local transit, these decisions do not operate to cause the "tollgate syndrome" claimed to result from Washington's tax. Resp. Br. 26-27. Not only is this argument logically inconsistent, but it also misses the point.

If one accepts the Stevedores' premise that a tax on the mover of goods is equivalent to a tax on the goods themselves, then surely the Stevedores would have to contend that a tax on the *intrastate*

portion of carriage of goods moving in *interstate* commerce operates to create the very sort of impermissible "toll" on the entry or departure of such goods into or from the taxing state as they complain of in the present case, and presumably, such a tax should be struck down. Yet, in both *Interstate Oil Pipeline*, *supra*, and *Complete Auto Transit*, *supra*, the Court upheld the challenged Mississippi taxes even though it expressly assumed that the local in-state movement of goods was a part of interstate commerce. *Interstate Oil Pipeline*, 337 U.S. at 666; *Complete Auto Transit*, 430 U.S. at 276, fn. 4.

Furthermore, the third of these cases, *Canton Railroad*, *supra*, cannot be so easily dismissed as the Stevedores have attempted, given that it involved a gross receipts tax on an intrastate railroad carrying goods moving in interstate and foreign commerce to and from inland states. Local consumers and producers were not asked to bear the economic burden of the tax, but the tax was nevertheless sustained against a challenge under the Import-Export Clause.

More generally, the Stevedores are really arguing for a return to the discarded notion that interstate and foreign commerce should enjoy a "free trade" immunity from state taxation. See, e.g., *Freeman v. Hewit*, 329 U.S. 249, 252 (1946); *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951).

The point to be made—which the Stevedores

miss—is that if the states can require interstate or foreign commerce to "pay its way", the economic burden of one state's tax must necessarily be borne to some extent by citizens of other states. Contrary to the argument of the Stevedores, the mere fact that a state's tax causes the cost of transporting goods to be somewhat higher than might otherwise be the case does not in and of itself create the "trade barrier" effect forbidden by the Constitution. There is no good reason why consumers and producers in other states or foreign countries should not bear some of the costs incurred by Washington in rendering governmental services to transporters of goods entering into or departing from Washington any more than such persons should not be required to bear other costs incurred by the transporter of goods. While it is possible, if not even likely, that allowance of Washington's tax may increase somewhat the cost of goods purchased either by "inland" or foreign customers, surely, as in *Michelin*, "* * * such taxation is the *quid pro quo* for benefits actually conferred by the taxing State." *Michelin*, *supra*, 423 U.S. 276, at 289.

The crucial question, which the Stevedores alternately ignore and dismiss, is whether the tax in question in practical operation and effect discriminates against or imposes multiple burdens upon goods moving through Washington. If it does not, the tax—however it be termed—does not create the evils forbidden by the Commerce and Import-Export

Clauses, and should be regarded as exacting a constitutionally permissible demand on interstate and foreign commerce in return for the governmental services rendered by Washington.

One final argument must be stated. As already discussed, the Stevedores in their brief have attempted to draw as an important distinction a line between decisions of this Court involving movement and those involving non-movement; Resp. Br. 23, et seq. Several shortcomings of this analysis have already been discussed throughout this brief but one additional consideration deserves attention.

In a real sense, both *Michelin* and *Complete Auto Transit* constitute victories of substance over mere formalism, and of economic reality over purely mechanistic labeling.[6] Having demonstrated that Washington's B&O tax on stevedoring activities does not contravene any of the purposes of the Commerce or Import-Export Clauses, Washington submits that no useful or functional object would be served were this Court to resolve this case by adopting still another rigid formalism to determine the validity of the challenged tax, namely that offered by the Stevedores of attempting to distinguish between movement and non-movement. Were such a distinction to be raised to the exalted station of a constitutional standard for the Commerce and Import-Export Clauses, the law concerning the powers of states to

[6] See generally, W. Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?* 75 MICH. L. REV. 1426 (1977).

tax would be set back to a rule of "draftsmanship and phraseology", a rule which this Court so clearly has rejected in its two recent Commerce and Import-Export Clause cases.

CONCLUSION

For all the reasons set forth in this brief and Petitioner's Opening Brief, Washington's business and occupation tax upon stevedoring activities does not abridge any of the purposes of either the Commerce or Import-Export Clauses of the Constitution; nor does it produce any constitutionally proscribed effects on interstate or foreign commerce.

In order to complete the orderly revision of this Court's interpretations of the Commerce and Import-Export Clauses reflected in *Complete Auto Transit* and *Michelin, supra*, the decision of the court below should be reversed and the constitutional validity of the challenged administrative rule should be upheld.

DATED this 10th day of January, 1978.

Respectfully submitted,

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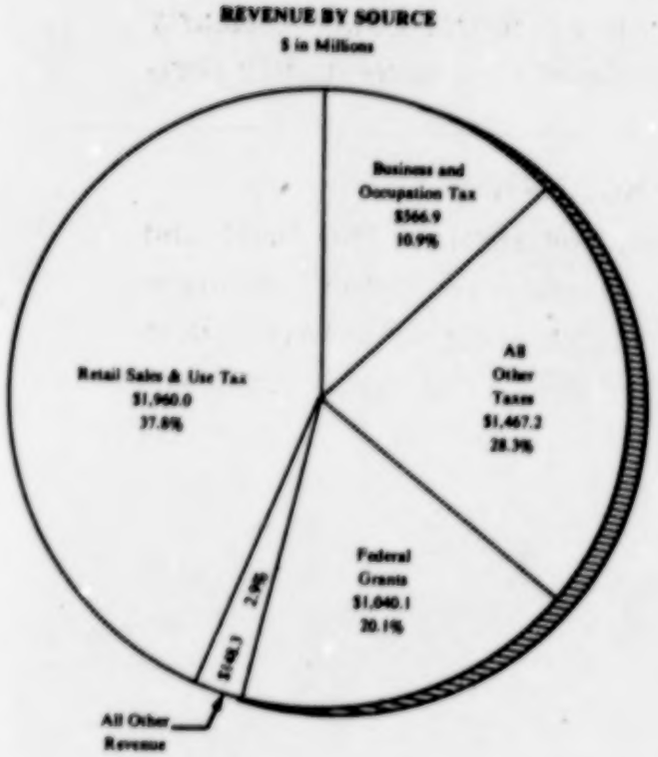
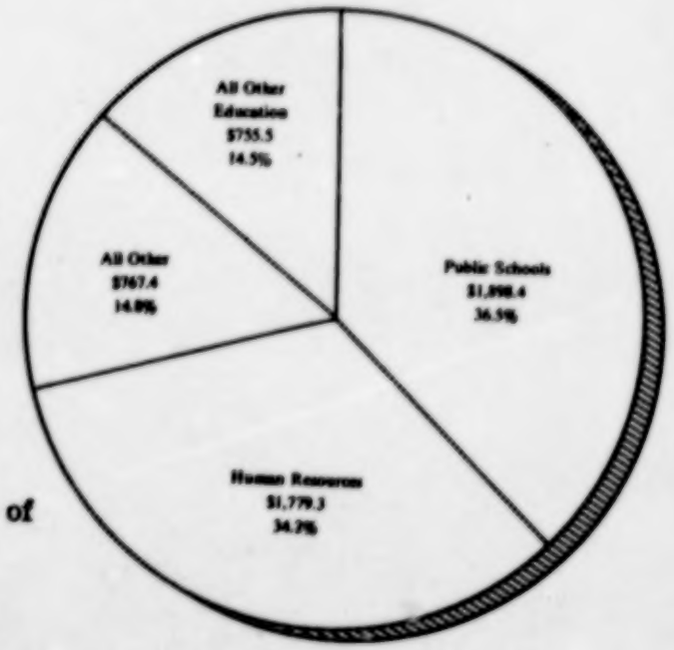
APPENDIX A

1977-79 GENERAL FUND BUDGET



THE BUDGET DOLLAR — WHERE IT COMES FROM

Taxes	77¢
Federal Grants	20¢
All Other	3¢



THE BUDGET DOLLAR — WHERE IT GOES

Education	51¢
Human Resources	34¢
All Other	15¢

Source: 1977-79 Budget Message of Governor Dixy Lee Ray